

No. **37**

United Supreme Court
FILED
MAR 3
WM. R. STA

In The Supreme Court of the United States.

OCTOBER TERM, 1920

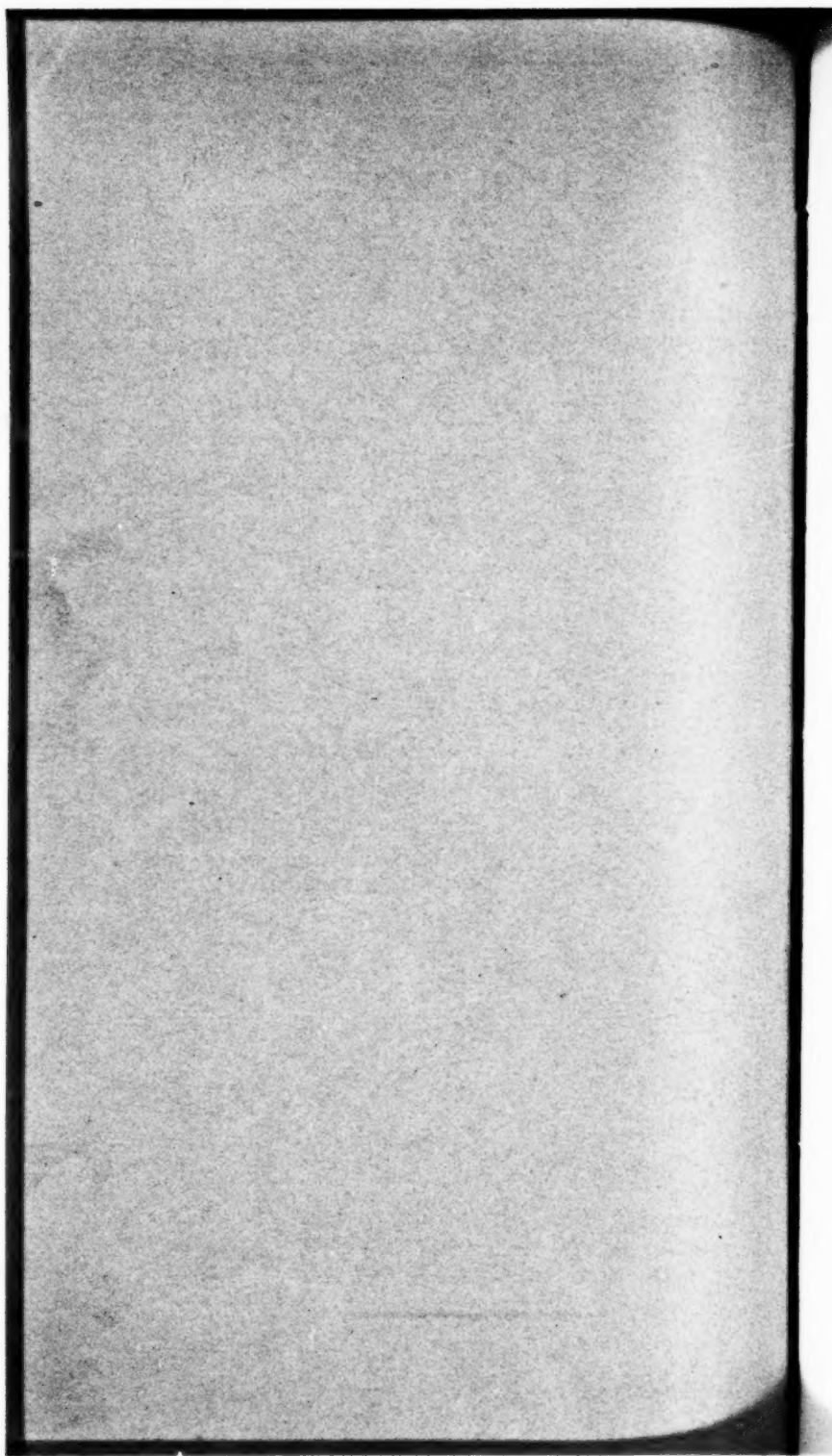
OKLAHOMA NATURAL GAS COMPANY,
Plaintiff in Error,
vs.

THE STATE OF OKLAHOMA, ET AL.,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE
STATE OF OKLAHOMA

SUPPLEMENTAL BRIEF OF DEFENDANTS
IN ERROR

CHARLES H. RUTH,
MARIE S. RUTH,
Counsel for Defendants in Error.



INDEX

	Pages
STATEMENT OF CASE-----	1-2
Reference to Art. 9, Sec. 18, of Constitution----	2
Reference to Art. 9, Sec. 20-22, of Constitution---	3
AGREEMENT -----	4-10
<i>St. L. & S. F. Ry. Co. v. Williams</i> -----	11
<i>Hines v. Waddleton</i> -----	11
<i>Chi. Ind. & Louisville Ry. v. Ry. Com.</i> -----	12
<i>So. Ry. Co. v. Ry. Com.</i> -----	12
Okla. Corp. Com. Order of March, 1916-----	13
<i>Nowata Gas Co. v. State (Okla.)</i> -----	14
SUMMARY -----	15-18
<i>Leeper v. Texas</i> -----	18
<i>Twining v. New Jersey</i> -----	18
<i>Francomb v. City and County of Denver</i> -----	19
<i>People of N. Y. ex rel. N. Y. and Queens Co. Gas Co. v. McCall et al.</i> -----	19
<i>Detroit, Ft. Wayne & B. I. Ry. Co. v. Osborn</i> -----	19
<i>Louisville & Nashville Railroad Co. v. Ry. Com. of Kentucky</i> -----	20

In The Supreme Court of the United States.

No. 312

OCTOBER TERM, 1920

OKLAHOMA NATURAL GAS COMPANY,
Plaintiff in Error,

vs.

THE STATE OF OKLAHOMA, ET AL.,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE
STATE OF OKLAHOMA

SUPPLEMENTAL BRIEF OF DEFENDANTS IN ERROR

This is an action brought to this Court upon writ of error from the Supreme Court of the State of Oklahoma, alleging error in the last named court in affirming the order and judgment of the Corporation

Commission of the State of Oklahoma, requiring the Oklahoma Natural and the Oklahoma Gas & Electric Company to conform to that order to the end that certain abuses might be corrected and certain extortions prevented.

So far as affects this particular case, the facts are that in the winter of 1917-18, as shown by the record herein, there was a serious natural gas shortage in Oklahoma City and great suffering resulted therefrom.

The gas company enjoyed a list of approximately fourteen thousand (14,000) subscribers to their service; that is in a city of one hundred thousand (100,000) population, fourteen thousand (14,000) meters had been installed. During this shortage, approximately twelve thousand (12,000) persons describing themselves as users of natural gas and directly affected by the shortage, filed a complaint with the Corporation Commission of Oklahoma praying for certain specific relief and for general relief.

This Corporation Commission is a body created by the Constitution of Oklahoma, with wide powers in relation to the control of public service corporations within the state relating to their dealings with the public in purely local or domestic affairs. The powers of this Commission are defined in Article 9 of the Constitution, and in Section 18 thereof it is provided that

they shall have the power, and be charged with the duty of supervising, regulating and controlling all transportation and transmission companies doing business in the state in all matters relating to the performance of their duties and their charges therefor, and of correcting abuses and preventing unjust discriminations and extortions by such companies.

The same section provides that by act of the legislature the Corporation Commission may be vested with certain other powers not inconsistent with the Constitution of the state.

Section 20 of Article 9 authorizes appeals from all orders of the Corporation Commission to the Supreme Court of the state.

Section 22 of Article 9 of the Constitution of the State of Oklahoma provides for a certification of the facts and evidence by the chairman of the Corporation Commission to the Supreme Court of the state with the reasons upon which the transaction of the Commission was based, as follows:

"The Supreme Court shall have jurisdiction upon such appeal to consider and determine the reasonableness and justness of the action of the Commission appealed from, as well as any other matter arising upon such appeal; provided, however, that the act of the Commission appealed from shall be regarded as *prima facie*, just, reasonable

and correct, but the court may, when it deems necessary in the interest of justice, remand to the Commission any case pending on appeal and require the same to be further investigated by the Commission, etc."

By the foregoing Section 18 it will be noted that the Commission is vested with specific powers to correct abuses and prevent unjust discriminations and extortions.

By virtue of the power vested in the Commission it did in March, 1916, issue Order No. 1028, requiring natural gas companies furnishing light, heat or power to construct their lines so as to at all times furnish an adequate supply for heating and cooking for domestic consumption, and from time to time the Commission fixed the rates to be charged by the companies based upon an adequate supply of gas.

In 1917 and 1918 the supply being wholly inadequate and insufficient, the citizens filed their complaint with the Corporation Commission, which Commission, after hearing all the evidence, determined that the companies had collected for gas which they had not delivered, and as the rate established was based upon an adequate supply and as the companies had failed in this particular, the said companies were entitled only to such money as might be found to be due them for gas furnished under normal pressure, to-wit: four

ounces, it being shown to the Commission by the experts for the companies that a four-ounce pressure was necessary to be maintained to furnish an adequate supply and it being admitted by the company that this pressure had not been maintained during said periods of the winter 1917-1918.

It may be stated here in this connection that the record discloses the fact that before installing a meter the company requires the applicant for a meter to deposit a sum for one and one-half months service in advance of the installation to insure the company against loss. They, therefore, at all times have money of the customer in their treasury to insure them against one and one-half months service.

Under such an arrangement the customer has already paid for a six weeks supply of gas before he has used it, and if the customer refuses to pay an extortionate charge, to pay for gas he does not use or is not supplied him, the company has but to transfer any amount charged against him from the credit to the debit side of the ledger. By reference to the transcript of the record it will be noted that the manager of the Oklahoma Gas & Electric Company, and other witnesses for the company, testified that a four ounce pressure was necessary to furnish an adequate supply of gas for domestic consumption, and when the pressure

fell below four ounces, it was inadequate, and the same witnesses testified that all meters were constructed, set or gauged upon the four ounce basis.

The Oklahoma Gas & Electric Company had installed thirty or more pressure gauge stations in various parts of the city, the city being divided into zones or districts, and these gaugers marked with a clock-like mechanism with needle and dial arrangement the pressure in that particular zone, and as the pressure was raised or lowered, the needle traveled toward the inner or outward edge of the dial, tracing a distinct line thereon. These dials did record the pressure each and every hour of each and every day for a period of one month so that upon the removal of the dial and the insertion of new dials, it could be seen at a glance what the pressure was at any hour of any day during the month, and the average pressure could be readily computed for a given period. It was established by the evidence and not controverted, that there was an inadequate supply of gas furnished during a period in December, 1917, and January, 1918, and at certain periods in certain zones or districts there was a total absence of pressure, while in other districts the pressure averaged one, two, three and four ounces, and notwithstanding the low pressure or absence of pressure, the gas bills were as great and in some instances greater in the districts of low pressure

or no pressure than were the bills for the months previous when there was an average pressure of four ounces over the whole city, and the subscriber or consumer was subjected to this extortionate charge and required to pay the same or have the service discontinued, and was charged the sum of one (\$1.00) dollar for the mere physical act of turning on the gas by an employe of the company after the consumer had been frozen into submission to this extortion, notwithstanding the company had on deposit from each consumer sufficient cash to pay for a six weeks supply in advance.

It was further established by the uncontroverted testimony, that in certain zones during this period of inadequate supply, that although the gas burner was opened and a lighted match applied thereto, no flame could be produced, yet the meter registered just the same, to the discomfiture of the customer and to the comfort and profit of the company. This fact is established by the testimony of the manager of the company, who testifies on page 63 of the record that the meter registers by volume irrespective of pressure and registers as rapidly when you cannot obtain a flame, or as testified to by one of the witnesses that he could get a flame but one-half inch high as it does when you could get a flame five and one-half inches high from the same burner under a four ounce pressure, and by

the unconverted testimony of Judge Donnell, his meter registered just as rapidly when he could not produce a flame, when he could not even smell gas coming through the alleged burner as it registered when he received an adequate supply.

It being admitted by the plaintiff in error that this shortage occurred and no testimony being introduced or offered that the consumer's bill had been reduced in ratio with the inadequacy of the service, the Corporation Commission in consideration of all the evidence, required the Oklahoma Gas & Electric Company to produce all its pressure gauge station dials for the period of the inadequate supply; and the adequacy of the service rendered computed therefrom, and in those zones where the pressure was four ounces, the Commission determined the company was entitled to full payment; and where the pressure fell below four ounces and down to three ounces, the company was entitled to but seventy-five percent of the face of their bill; and where the meter registered less than three ounces and down to two ounces, the company was entitled to fifty percent; and from two ounces to one ounce they were entitled to but twenty-five percent on the basis that they were only rendering twenty-five percent efficiency; and where the dial at the pressure gauge station showed an average of less than one ounce—in the zone where Justice Donnell lived and

where no flame could be produced and where even the smell of gas could not be detected—the company could make no charge for service on the theory that if the pressure was less than one ounce at the station, the further the pipes extended from the station the less the pressure would be and no service was given; and to prevent these extortionate charges, the Corporation Commission decided that the threat by the company to discontinue service until these unjust bills were paid, constituted extortion, which the Commission was, under the Constitution, empowered to prevent, and so order the company to rebate to the consumers in these various zones the sums of their extortion.

This, the company claims is taking their property without due process of law, while the defendant in error claims it is simply making the company disgorge and make restitution of the sums extorted in payment for a commodity never furnished.

Another instance of the inadequacy of the supply furnished lays in the testimony of the manager of the corporation as to the number of B. T. U. or British Thermol Unites or heat units. He testifies that if you take a cubic foot of gas under thirty-pound pressure and attach a meter, also a pressure gauge, and then permit the gas to flow until the pressure has been reduced to fifteen pounds, onehalf of the B. T. U's.

have escaped; and when it is reduced to five pounds, five-sixths of the B. T. U's. have escaped; and so the United States Bureau of Mines having issued its circular, set forth in the record, showing natural gas in Oklahoma to contain approximately 960 B. T. U. per cubic foot at a four-ounce pressure, when it is reduced to one-ounce pressure it has lost seventy-five percent of its heat units or heat value; and when it will not ignite, it has lost all its B. T. U. or heat units and the company is charging for that which it is not delivering, and by appropriating the people's money already in its possession and threatening to turn off the gas until the bill is paid and charge the consumer one (\$1.00) dollar to turn it on again, they are certainly guilty of one of the abuses of the Constitution designed to prevent through the Corporation Commission, and guilty of extortion as contemplated when the Constitution conferred power upon the Commission to regulate public service corporations and prevent extortions.

Counsel for plaintiff in error says in his brief that all relief prayed for was denied and relief not prayed for was granted, to-wit, a rebate. In reply to this we state that the supplemental complaint prays in addition to specific relief granted, that the "Company be dealt with as the facts justify." Counsel further claims the plaintiff in error had no notice of the fact that such relief as a rebate would be granted, but the

fact remains that there was a prayer for general relief, and the plaintiff in error received its notice and entered their appearances and filed their answers. The record shows this hearing was commenced on February 2 and testimony taken from day to day until February 27 or 28, 1918, and on the first day of the hearing testimony was offered by the complainants showing the meter was diligently recording but that no flame or heat could be secured from the elements or commodities causing such record to be made, and no effort was made by the plaintiff in error to controvert this testimony.

Under the laws of this state no formal pleading is necessary before the Corporation Commission, in fact, it does not even have to wait upon complaint, but of its own motion may cite a corporation before it and give such relief as the facts justify. This has been the holding of the Supreme Court of the State of Oklahoma in numerous cases. In *St. Louis & San Francisco Railway Company v. Williams*, 25 Okla. 162; 107 Pac. 428, it is held:

"Its (Corporation Commission) jurisdiction does not depend upon any special form of pleading, the test being not the relief prayed for, but that granted. In fact it is not essential that any petition be filed, but that notice shall be had."

In *Hines v. Waddleton*, 27 Okla. 28; 111 Pac. 543, held:

"In proceedings before the Corporation Commission no strictness of pleading is required."

The above cited case was by the court remanded to the Corporation Commission with instructions "to proceed to make such investigation of the evidence introduced at the former hearing and all other evidence that may hereafter be offered by any party in interest as is necessary to make a finding of facts." This was in conformity with the constitutional provision relative to remanding, and in the instant case, had the plaintiff in error believed it had been deprived of an opportunity to controvert the evidence, and had believed it could have produced evidence controverting the evidence of meter registering just as rapidly when no flame could be produced as when they had a five and one-half (5½) inch flame, the court would have upon request remanded the cause for further hearing.

In *Chicago, Indianapolis & Louisville Railway Company v. Railway Commission*, 39 Ind. App. 345; 79 N. E. 927, it was held:

"No strictness of pleading is required by the act and both the complaint filed with the Commission and the concise written statement filed in this court must be largely construed for the purpose of obtaining a disposition of the matter involved upon their substantial merits."

In *Southern Railway Company v. Railway Commission*, 42 Ind. App. 90; 83 N. E. 721, it was held:

"No strictness in pleading is required in proceedings before the Railway Commission and it is vested with ample power to frame its order as the substantial justice may require, irrespective of the relief asked for in the petition."

This has been the uniform holding by the state supreme courts generally.

We direct this Court's attention to the fact that the Constitution of Oklahoma was adopted in 1907, and with full knowledge of the constitutional powers of the Corporation Commission, the Oklahoma Gas & Electric Company applied to the people of Oklahoma City for a franchise and the people by their votes granted the same. It appears from the record that on March, 1916, the Corporation Commission promulgated Order No. 1028, as follows:

"It is therefore considered, ordered and adjudged that each and every corporation (mentioned in Chapter 93 of the Laws 1913) supplying natural gas for natural consumption, or for conveying of gas by pipe lines for delivery, or for furnishing heat or light with gas, or in any way directly or indirectly supplying natural gas * * * for domestic consumption, is hereby required to construct and equip and maintain its pipe lines, mains and distributing systems so as to be at all times able to furnish an adequate supply of gas for domestic consumption, and is hereby ordered to furnish and supply at all times an adequate amount of the proper quality for heating, cooking and lighting for domestic consumption."

Mr. Molinard, manager of the Oklahoma Gas & Electric Company, testifies that he knew of the order of March, 1916, but wholly disregarded it, and the company made no effort to secure an adequate supply of gas of proper quality, but relied entirely upon the statements of the officers of the Oklahoma Natural, and when the Oklahoma Natural failed to furnish the Oklahoma Gas & Electric Company with an adequate supply of proper quality, the consumer must suffer the consequences.

The Supreme Court of Oklahoma, in *Nowata Gas Company v. State*, 177 Pac. 618, held:

"Where a gas company is required by order of the Corporation Commission to furnish an adequate supply of gas for domestic consumption and is allowed to charge the public a maximum rate which is based upon "*an adequacy of service rendered*," as well as upon the quality of the gas furnished, and it is subsequently shown that this duty of sufficiency is not sustained by the company during said winter months, the Corporation Commission has power to make an order requiring the company to discount its bills rendered for such months, a certain percent, for the purpose of proportioning the maximum rate allowed according to the efficiency of the service rendered, as well as to the quality of gas furnished, where it is practical to do so, and where it appears from the findings of fact of the Corporation Commission, which are conceded to be correct, that the discount ordered bears a fair relation to the falling off in service, such order will not be disturbed on appeal."

Nowhere in the record does it appear that the plaintiff in error ever attempted to show that the service was adequate, or that the quality was of such a nature as to produce heat or flame; in fact, they conceded that a shortage did occur at the times mentioned in the complaint; nor did they at any time attempt to controvert the testimony that the meter operated as rapidly when you could produce no flame, as it did when the supply was adequate under the four-ounce pressure.

Summarized we find the following conditions:

First—The Constitution of Oklahoma provides for a Corporation Commission.

Second—The Constitution of Oklahoma confers power upon the Corporation Commission to correct abuses and prevent unjust discriminations and extortions.

Third—The Oklahoma Gas & Electric Company accepted a franchise with a full knowledge of the constitutional provisions.

Fourth—That there was a shortage of gas in Oklahoma City during the period covered by the record.

Fifth—The people filed a complaint asking for specific and general relief.

Sixth—The company had notice and did appear

before the Corporation Commission, cross-examined witnesses, introduced testimony on its own behalf.

Seventh—The evidence, uncontroverted, was that gas meters registered when no commodity was passing through the meters that might be utilized—no flame or heat could be produced.

Eighth—That a four-ounce pressure is necessary for an adequate supply of gas.

Ninth—That the Corporation Commission had in 1916 by Order No. 1021 directed the public service corporations (gas and electric) to equip their systems to give an adequate supply.

Tenth—That rates were fixed by the Corporation Commission upon the basis of an adequate supply.

Eighteenth—The Oklahoma Gas & Electric Company wholly disregarded this order and made no effort to comply therewith.

Twelfth—The gas company admits the shortage and by the introduction of their own pressure gauge dials discovers to the Commission that in certain zones the pressure was nil, and in other zones it ranged from nothing to four ounces.

Thirteenth—That the gas company charged according to the individual reading of the gas meters

whether the customers obtained a commodity capable of ignition or not.

Fourteenth—The gas company required customers to make a deposit covering a period of six weeks, or payment of six weeks in advance.

Fifteenth—The Oklahoma Gas & Electric Company threatened to turn off the gas until the customer submitted to this extortion and to a further extortionate charge of \$1.00 for the physical act of turning it on again.

Sixteenth—The Corporation Commission, to correct this abuse and prevent this extortion, required them to rebate or make reparation for gas not actually furnished.

Seventeenth—The Corporation Commission under the Constitution might give any relief the evidence disclosed was proper, and was not confined to the pleadings.

Eighteenth—The Oklahoma Gas & Electric Company appealed to the Supreme Court of the state and did not offer to produce either before the Corporation Commission or the Supreme Court any evidence controverting the established facts, nor ask that the cause be remanded to the Commission for the introduction of such evidence.

Nineteenth—By the provisions of the constitution of the state and by judicial decision of the Supreme Court of the state the finding of facts by the Corporation Commission are *prima facie*, just and reasonable.

Twentieth—The Supreme Court of Oklahoma affirmed the judgment of the Corporation Commission and the plaintiff in error now appears in this Court declaring it has been deprived of its property without due process of law, as provided by the Fourteenth Amendment of the Constitution of the United States.

This Court has construed the Fourteenth Amendment so often that it will only be necessary to cite a few of its opinions.

Leeper v. Texas, 11 S. Ct. 577; 139 U. S. 462:

“Law in its regular course of administration through courts of justice is due process, and when secured by the law of the state, the constitutional requirement is satisfied and it is so secured by laws operating on all alike and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice.”

Twining v. N. J., 29 S. Ct. 14; 211 U. S. 78; 53 L. Ed. 97:

“Due process of law requires that the court which assumes to determine the rights of parties, shall have jurisdiction and that there shall be notice and opportunity for hearing, but, subject to these conditions, state laws, statutory or judicially

declared, which regulate procedure evidence and methods of trial are consistent with due process of law."

Framcomb et al. v. City and County of Denver,
40 S. Ct. 271; 252 U. S. 7 (Day, J.) :

"This Court, when dealing with the constitutionality of states statutes challenged under the Fourteenth Amendment, accept the meaning thereof as construed by the highest court of the state. (Citing *St. Louis and Kansas City Land Company v. Kansas City*, 241 U. S. 419; 36 S. Ct. 647; 60 L. Ed. 1072.) As the plaintiff had an opportunity to be heard before the board duly constituted by Section 300, they cannot be heard to complain."

People of the State of New York, ex rel. New York and Queens County Gas Company v. McCall et al., Public Service Commission, First District New York,
245 U. S. 345; 38 S. Ct. 122:

"Where a gas company appeared before a public service commission at a hearing on the question of ordering an extension of its mains and service pipes; cross-examined witnesses, introduced testimony and argued the case, and the case was re-examined by the appellate division of the Supreme Court on *certiorari* and reviewed by the Court of Appeals, there was no want of due process of law."

Detroit, Ft. Wayne & B. I. Ry Co. v. Osborn,
23 S. Ct. 540; 189 U. S. 384; 47 L. Ed 860:

"An objection that the state statute violates the Federal Constitution because it does not pro-

vide for notice to those who may be affected by it is not available to a party who was in fact given notice and who at the hearing objected to the action proposed to be taken under such statute."

Wilmington City Ry. Co. v. Taylor, 198 Fed. 159:

"The Fourteenth Amendment does not control the power of a state to determine by what process legal rights may be asserted or legal obligations enforced, provided the method adopted gives a reasonable notice and affords a fair opportunity to be heard."

Louisville & Nashville Railroad Company v. Railway Commission of Kentucky, 35 S. Ct. 146; 235 U. S. 601 (Pitney, J.), was an action brought up from the United States District Court of Kentucky upon its refusal to enjoin the enforcement of rate making and reparation (rebate orders). The laws of Kentucky gave the Railway Commission power to correct abuses and prevent extortion. It appears the railway had established rates and had maintained them in force for more than thirty years with reference to supplies, such as grain, barrels, boxes, etc., to the distilleries, and this was done for the purpose of having distilleries locate along their lines. Consequently the railway companies arbitrarily raised their rates and complaint was made to the Railway Commission of the State of Kentucky to re-establish the rates that had been in force. The Railway Commission of Kentucky by order re-established the former rates and required the railway company to make reparation or rebate, or to pay back to

the distillery companies the difference between the rates heretofore in effect and the rates arbitrarily put into effect by the railway company, and this Court held:

"The procedure under Ky. Stat., Chapter 829, for recovery before the State Railroad Commission of reparation for payments previously made to a carrier for transportation in excess of the rates found by such commission to be reasonable, cannot be said to deny the due process of law guaranteed by U. S. Const., 14th Amend., on the theory that there is no formal issue and no method of requiring the production of evidence, where there were pleadings sufficiently formal, and the carrier was permitted to raise such issues and introduce such evidence as it desired, and there is nothing to show that it suffered for lack of compulsory process against witnesses. (Ed. Note—For other cases, see Constitutional Law. Cent. Dig. Chapter 928, 936, 939, 942-946, 948, 949; Dec. Dig. Chapter 306)."

Upon consideration of the facts stated in the record and the brief and supplemental brief of defendant in error, and the sections of the Constitution of Oklahoma, and the adjudicated cases herein referred to of the Oklahoma Supreme Court and this Honorable Court, we submit our cause.

CHARLES H. RUTH,
MARIE S. RUTH,

Counsel for Defendants in Error.